



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Parts 3 and 20

RIN 2900-AO43

Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans' Appeals; Repeal of Prior Rule Change

AGENCY: Department of Veterans Affairs.

ACTION: Final rule; confirmation of effective date and addition of applicability date.

SUMMARY: The Department of Veterans Affairs (VA) published a direct final rule amending its hearing regulations to repeal a prior amendment that specified that the provisions regarding hearings before the Agency of Original Jurisdiction (AOJ) do not apply to hearings before the Board of Veterans' Appeals (Board). VA received no significant adverse comment concerning this rule. This document confirms that the direct final rule became effective on June 18, 2012. Additionally, in the preamble of the direct final rule, VA did not provide an applicability date. This document provides an applicability date.

DATES: Effective Date: This final rule is effective June 18, 2012.

Applicability Date: This final rule shall apply to decisions issued by the Board on or after August 23, 2011.

FOR FURTHER INFORMATION CONTACT: Laura H. Eskenazi, Principal Deputy Vice Chairman, Board of Veterans' Appeals (01C), Department of Veterans Affairs, 810

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SUPPLEMENTARY INFORMATION: On April 18, 2012, VA published in the Federal Register, 77 FR 23128, a direct final rule to amend, in 38 CFR part 3, § 3.103(a) and (c)(1), and, in 38 CFR part 20, § 20.706 and Appendix A to repeal amendments made by RIN 2900-AO06, “Rules Governing Hearings Before the Agency of Original Jurisdiction and the Board of Veterans’ Appeals; Clarification,” a final rule that had been published in the Federal Register on August 23, 2011. As discussed in the preamble to the direct final rule, RIN 2900-AO06 altered language upon which the United States Court of Appeals for Veterans Claims (Veterans Court) relied in Bryant v. Shinseki, 23 Vet. App. 488 (2010), which applied the provisions of § 3.103(c)(2) to a Board hearing. The Bryant Court held that the provisions of § 3.103(c)(2) require a “Board hearing officer” to “fully explain the issues still outstanding that are relevant and material to substantiating the claim” and to “suggest that a claimant submit evidence on an issue material to substantiating the claim when the record is missing any evidence on that issue or when the testimony at the hearing raises an issue for which there is no evidence in the record.” Id. at 496-97.

VA determined that RIN 2900-AO06 should have followed the notice-and-comment procedure of 5 U.S.C. 553(b) and (c) of the Administrative Procedure Act and published the direct final rule to return the regulations to the language in effect before August 23, 2011. The direct final rule provided a 30-day comment period that ended on

May 18, 2012. No significant adverse comment was received. VA received only one comment on May 17, 2012, from the National Organization of Veterans' Advocates, Inc. (NOVA). In pertinent part, NOVA stated, "[T]he full, retroactive repeal of the invalid [amendments made by RIN 2900-AO06] should move forward regardless of whether the 'VA receives a significant adverse comment by May 18, 2012.' . . . VA has a responsibility to repeal the rule as quickly as possible. Doing so will help ensure that any veterans harmed by the invalid rule will be able to obtain appropriate relief." Accordingly, under the direct final rule procedures that were described in RIN 2900-AO43, the direct final rule became effective on June 18, 2012, because no significant adverse comment was received within the comment period.

We take this opportunity to address three points made by NOVA in its comment. NOVA criticized the direct final rule procedure because it was "conditional rather than mandatory." As we anticipated when we published the direct final rule, no significant adverse comment was received by VA, and the direct final rule became effective on June 18, 2012. Accordingly, NOVA's concern about the action being conditional is moot.

NOVA also urged that the "repeal of [the amendments made by RIN 2900-AO06 be] retroactive to August 23, 2011." In the direct final rule, we stated that we were "repealing" those amendments but provided only an effective date—June 18, 2012. We did not provide an applicability date. Accordingly, in this document we have added, in

the DATES section above, an Applicability Date paragraph, stating, “This final rule shall apply to decisions issued by the Board on or after August 23, 2011.”

Finally, NOVA also encouraged VA to “clarify that any veteran who suffered any harm as a result of the invalid rule is now entitled to obtain relief.” In this regard, appellants have a statutory right to appeal a Board decision to the Veterans Court within 120 days after the date on which the appellant is notified of the Board’s decision. See 38 U.S.C. 7266(a). Additionally, VA regulations permit appellants whose claims have been denied by the Board to file with the Board at any time a motion for reconsideration of the decision. See 38 CFR 20.1001. If the Chairman of the Board denies a motion for reconsideration, that denial and the underlying Board decision may be appealed to the Veterans Court if a timely appeal was previously filed with the Veterans Court with respect to that underlying Board decision. See Mayer v. Brown, 37 F.3d 618, 620 (Fed. Cir. 1994), overruled in part by Bailey v. West, 160 F.3d 1360 (Fed. Cir. 1998) (en banc). Also, the Board’s decision may be appealed to the Veterans Court if the appellant filed the motion for reconsideration not later than 120 days after being notified of the Board’s decision and then appeals to the Veterans Court not later than 120 days after reconsideration is denied. Rosler v. Derwinski, 1 Vet. App. 241, 249 (1991); see also Linville v. West, 165 F.3d 1382, 1385-86 (Fed. Cir. 1999). Additionally, the 120-day period to appeal a Board decision to the Veterans Court is subject to the doctrine of equitable tolling within certain parameters. See Bove v. Shinseki, 25 Vet. App. 136, 140 (2011). These procedures provide adequate avenues of relief to any claimants who may have been adversely affected by the repealed rule.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, Department of Veterans Affairs, approved this document on November 20, 2012, for publication.

Dated: November 20, 2012

Robert C. McFetridge,
Director, Regulation Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

[FR Doc. 2012-28621 Filed 11/26/2012 at 8:45 am; Publication Date: 11/27/2012]